JJ Power Groups Enterprise & Ors v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(L)-153–08 OF 2022(W)
ABANG ISKANDAR PCA, MARY LIM AND ABU BAKAR JAIS FCJJ
23 JUNE 2025

Criminal Procedure — Forfeiture — Forfeiture of seized properties — Public Prosecutor ('PP') seized properties under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLA') — Whether application to forfeit seized properties under s 56 of AMLA required PP to prove predicate offence beyond reasonable doubt — Whether s 56(4) and s 70(1) of AMLA clearly stated that 'balance of probabilities' standard of proof was to be applied to determine forfeiture application under s 56

The instant appeal was against the Court of Appeal's affirmation of the High Court's decision to allow the respondent's application to forfeit seized properties belonging to the appellants under s 56 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA') in circumstances where there was neither prosecution nor conviction for an AMLA offence. The application was premised on the ground that the seized properties were 'the subject-matter or evidence relating to the commission of an offence of money laundering' under s 4(1)(a) of the AMLA. Police had investigated the appellants for the offence of cheating under s 420 of the Penal Code ('the PC') as well as for money laundering under AMLA after receiving reports from several individuals that they had been deceived into investing their monies in a 'get-rich' scheme founded by the 16th appellant ('LCS') and carried on by all the appellants. The investors found that the scheme was illegal, for not being licensed, and that it did not yield the promised results. The respondent had frozen the bank accounts of the appellants and seized various properties they had bought using monies invested by the public in the scheme. LCS was given a discharge not amounting to an acquittal after being charged in the magistrate's court for committing an offence of cheating under s 420 of the PC. The appellants argued that since the 'predicate offence' of cheating was never proven beyond reasonable doubt, there was no basis for the AMLA charge of money laundering to exist. The appellants submitted that the courts below had wrongly applied the 'balance of probabilities' standard of proof to allow the forfeiture application and relied on the Court of Appeal's decision in *Simplex Sdn Bhd & Ors v Public Prosecutor* [2021] MLJU 32 ('Simplex') to argue that the respondent should have first proven the predicate offence of cheating beyond reasonable doubt before showing that monies derived from that activity were used to commit a money laundering offence. In reply, the respondent submitted that ss 56(4) and 70 of

the AMLA clearly required the court hearing a forfeiture application under s 56 of the AMLA to apply the 'balance of probabilities' standard to determine the application. A

Held, unanimously dismissing the appeals and affirming the decisions of the courts below: B

(1) The forfeiture of property proceedings envisaged under s 56 of the AMLA was a special regime specifically provided for in AMLA where there was no prosecution or conviction for an offence of money laundering or a terrorism financing offence. In proving each and every element in that proceeding, ss 56(4) and 70 of the AMLA imposed no other standard of proof but a standard of 'balance of probabilities' (see para 60). C

(2) *Simplex* had misinterpreted s 70(2) of the AMLA to mean that in a s 56 forfeiture application, the public prosecutor had to prove the predicate offence beyond reasonable doubt first before proving on balance of probabilities that proceeds derived from that predicate offence were used to commit an offence of money laundering under AMLA. Section 70(2) required the prosecution to prove beyond reasonable doubt any question of fact 'in any proceedings for an offence under this Act or any subsidiary legislation under it'. That phrase referred to an offence under AMLA itself or under any of its subsidiary legislation and did not include any of the listed 'serious offences' (including the cheating offence in this case) listed in the Second Schedule of AMLA because those 'serious offences' were offences under their respective relevant statutes and not under AMLA. This meant that the prosecution had to prove beyond reasonable doubt an offence under AMLA itself such as money laundering or a terrorism-financing offence. Section 70(2) was not intended to apply in the context of proving a predicate offence in a forfeiture proceeding (see paras 37, 39, 42 & 44). D E F G

(3) Based on all the evidence, the High Court had found on balance of probabilities that the respondent had succeeded in establishing the existence of the predicate offence of cheating under s 420 of the Penal Code and that the ingredients of deceit and deception were present in the appellants' illegal deposit-taking scheme. An appellate court would not disturb a trial court's findings of fact based on the assessment and examination of all the evidence unless such findings were 'plainly wrong'. In the instant case, there was no reason to depart from the findings of fact made by the courts below in their assessment of the evidence (see paras 50–51, 54, 58 & 60). H I

[Bahasa Malaysia summary

Rayuan semasa ini adalah terhadap pengesahan oleh Mahkamah Rayuan berhubung keputusan Mahkamah Tinggi yang membenarkan permohonan responden untuk melucuthak harta-harta yang telah disita milik perayu di bawah s 56 Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('APPWH') dalam keadaan tiada sebarang pendakwaan atau sabitan bagi kesalahan di bawah APPWH. Permohonan tersebut adalah berasaskan kepada alasan bahawa harta-harta yang disita tersebut merupakan 'perkara utama atau keterangan yang berkaitan dengan perlakuan suatu kesalahan pengubahan wang haram' di bawah s 4(1)(a) APPWH. Pihak polis telah menjalankan siasatan terhadap perayu atas kesalahan menipu di bawah s 420 Kanun Keseksaan ('KK') serta kesalahan pengubahan wang haram di bawah AMLA, susulan menerima aduan daripada beberapa individu bahawa mereka telah diperdaya untuk melaburkan wang mereka dalam skim cepat kaya yang diasaskan oleh perayu ke-16 ('LCS') dan dilaksanakan oleh kesemua perayu. Pelabur mendapati bahawa skim tersebut adalah skim haram kerana tidak dilesenkan, dan tidak memberikan pulangan seperti yang dijanjikan. Responden telah membekukan akaun bank perayu dan menyita pelbagai harta yang telah dibeli menggunakan wang pelaburan awam dalam skim tersebut. LCS telah diberikan pelepasan tanpa pembebasan selepas didakwa di mahkamah majistret atas kesalahan menipu di bawah s 420 KK. Perayu berhujah bahawa memandangkan 'kesalahan asas' menipu tidak pernah dibuktikan melampaui keraguan munasabah, maka tiada asas untuk pertuduhan pengubahan wang haram di bawah APPWH wujud. Perayu berhujah bahawa Mahkamah-mahkamah bawahan telah salah menggunapakai standard pembuktian iaitu 'imbangan kebarangkalian' dalam membenarkan permohonan lucuthak, dan bergantung kepada keputusan Mahkamah Rayuan dalam kes *Simplex Sdn Bhd & Ors lwn Pendakwa Raya* [2021] MLJU 32 ('Simplex') untuk menghujahkan bahawa responden seharusnya terlebih dahulu membuktikan kesalahan asas menipu melampaui keraguan munasabah sebelum membuktikan bahawa wang hasil daripada aktiviti tersebut digunakan untuk melakukan kesalahan pengubahan wang haram. Sebagai jawapan, responden menghujahkan bahawa ss 56(4) dan 70 APPWH dengan jelas memerlukan mahkamah yang mendengar permohonan lucuthak di bawah s 56 AMLA untuk mengguna pakai standard pembuktian 'imbangan kebarangkalian' bagi menentukan permohonan tersebut.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan keputusan mahkamah-mahkamah bawahan:

(1) Prosiding lucuthak harta seperti yang diperuntukkan di bawah s 56 AMLA merupakan suatu regim khas yang secara khusus diperuntukkan dalam APPWH dimana tiada pendakwaan atau sabitan terhadap kesalahan pengubahan wang haram atau pembiayaan keganasan. Dalam

membuktikan setiap elemen dalam prosiding tersebut, ss 56(4) dan 70 APPWH tidak memperuntukkan apa-apa standard pembuktian lain kecuali 'imbangan kebarangkalian' (lihat perenggan 60).

(2) Kes *Simplex* telah salah tafsir s 70(2) APPWH membawa maksud bahawa dalam permohonan lucut hak di bawah s 56, pendakwa raya perlu terlebih dahulu membuktikan kesalahan asas melampaui keraguan munasabah, sebelum membuktikan atas imbangan kebarangkalian bahawa hasil daripada kesalahan tersebut telah digunakan untuk melakukan kesalahan pengubahan wang haram di bawah APPWH. Seksyen 70(2) menghendaki pihak pendakwaan membuktikan tanpa keraguan munasabah apa-apa persoalan fakta 'dalam mana-mana prosiding bagi kesalahan di bawah Akta ini atau mana-mana perundangan subsidiari di bawahnya'. Frasa tersebut merujuk kepada kesalahan di bawah APPWH itu sendiri atau mana-mana perundangan subsidiarinya dan tidak termasuk mana-mana 'kesalahan serius' (termasuk kesalahan menipu dalam kes ini) yang disenaraikan dalam Jadual Kedua APPWH kerana kesalahan-kesalahan tersebut adalah kesalahan di bawah statut masing-masing dan bukan di bawah APPWH. Ini bermaksud pihak pendakwaan perlu membuktikan melampaui keraguan munasabah kesalahan di bawah AMLA itu sendiri, seperti pengubahan wang haram atau pembiayaan keganasan. Seksyen 70(2) tidak terpakai dalam konteks pembuktian kesalahan asas dalam prosiding lucuthak (lihat perenggan 37, 39, 42 & 44).

(3) Berdasarkan semua keterangan yang dikemukakan, Mahkamah Tinggi telah memutuskan atas imbangan kebarangkalian bahawa responden telah berjaya membuktikan kewujudan kesalahan asas menipu di bawah s 420 KK, dan bahawa elemen tipu helah dan penipuan wujud dalam skim pengambilan deposit haram oleh perayu. Mahkamah Rayuan tidak akan campur tangan terhadap dapatan fakta mahkamah bicara yang dibuat berdasarkan penilaian terhadap semua keterangan melainkan dapatan tersebut adalah 'jelas salah'. Dalam kes semasa, tiada alasan untuk menyimpang daripada dapatan fakta yang dibuat oleh mahkamah-mahkamah bawahan dalam penilaian mereka terhadap keterangan (lihat perenggan 50–51, 54, 58 & 60).

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721, FC (refd)

Mohd Ismail bin Syed Merah v PP and other appeals [2022] 3 MLJ 786, CA (distd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (refd)

Noor Ismahanum Mohd Ismail v PP [2019] 2 MLJ 536, CA (refd)
PP v Awalluddin bin Sham Bokhari [2018] 2 MLJ 401, FC (refd)
PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 2 CLJ 763, CA (refd)
PP v JJ Power Groups Enterprise & Ors [2020] MLJU 375, HC (refd)
PP v Kuala Dimensi Sdn Bhd & Ors [2021] 2 MLJ 469, FC (refd)
Simplex Sdn Bhd & Ors v PP [2021] MLJU 32; [2021] 4 CLJ 595, CA (overd)
Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3(1), 4(1), (1)(a), 32, 56, 56(1), (1)(a), (2), (4), 58, 70, 70(1), (2), Second Schedule
Financial Services Act 2013 ss 136, 137
Penal Code s 420

Appeal from: Criminal Appeal No W-05–606–12 of 2019 (Court of Appeal, Putrajaya)

Mohd Shukri bin Ahmad Mansor (with G Jaya Prem) (Asmah Shukri & Co) for the appellant.
Norzilati Izhani bt Zainal @ Zainol (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar PCA:

INTRODUCTION

[1] This appeal deals with a forfeiture of property by the public prosecutor ('PP') where there is no prosecution or conviction for an offence of money laundering or a terrorism financing offence — a proceeding provided for under s 56 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLA 2001'). It was the basis of the PP's application for forfeiture that the seized properties were 'the subject-matter or evidence relating to the commission of an offence of money laundering under sub-s 4(1)(a) of the AMLA (s 56(1)(a) of the AMLA). Except for some monies that were ordered to be returned to the 17th respondent, the High Court granted the forfeiture of all other listed properties (with some variation/exception in respect of the monies seized from the 18th and 19th respondents which were subject to an earlier settlement). This decision was affirmed and upheld unanimously by the Court of Appeal.

[2] Before us, out of 24 appellants, only four proceeded with the appeal. They are JJ Power Groups Enterprise, PCP Global Tech Sdn Bhd, Lee Choong Sen ('LCS'), and Alvin Chong Yew Kuan ('the appellants'). The appeal by the

rest of the appellants were thereby struck out.

[3] At the start of the proceeding, we were informed that the appellants intended to pursue with five out of six petitions of appeal, which they had categorised into two major issues. The first issue relates to the question of law on the standard of proof required to prove predicate offence in a forfeiture proceeding under s 56 of the AMLA 2001. The second issue concerns the findings of fact by the courts below on the offence of cheating under s 420 of the Penal Code vis a vis the nature of the investment which had been undertaken by the appellants as being an unlicensed, hence illegal deposit taking.

[4] Having read the cause papers including the judgments of the courts below, and both parties' written submissions, and having heard oral submissions by all learned counsel, we unanimously dismissed the appeal and affirmed the findings and decisions of the courts below.

BACKGROUND FACTS AND THE ANTECEDENT PROCEEDINGS

[5] Police investigation was triggered following a police report lodged by one Tan Kai Lin regarding his investment in the JJ Poor to Rich scheme ('JJPTR'), a scheme that promised the investors with certain percentage of monthly rate of returns based on the deposits or investment made. Subsequently, about 19 other individuals had also filed similar reports disclosing the same modus operandi of JJPTR.

[6] The investigation revealed that the investors were deceived into believing that the JJPTR was a licensed business of trading in foreign currencies, whereby, the investors were promised a monthly 20% rate of returns, despite there being no license obtained from the Central Bank of Malaysia for the kind of deposit taking or investment business undertaken. The investigation proceeded on the offence of cheating under the Penal Code and money laundering under the AMLA 2001.

[7] In this case, there were various bank accounts of the 33 respondents which were found to have been used to accept deposits for the investment and to accept remittances of returns of investment in the JJPTR. Certain bank accounts had also been used to purchase a property in Perak, a Volkswagen Beetle and a Honda Accord. Remittances were also made to the bank account of the 17th respondent for gambling excursions packages at the casino at Genting Highlands (the monies seized from the 17th respondent were ordered to be returned, and not forfeited).

[8] Police investigation also unveiled that LCS was the founder of the JJPTR

and the mastermind of the incorporation of a number of companies to perpetuate the scheme by fronting certain retail businesses as a guise, thereby disguising the investors as members of these businesses for the benefits that they will obtain in the form of a monthly returns.

[9] LCS was initially prosecuted with two others for cheating under s 420 of the Penal Code in the Kuala Lumpur Magistrate's Court. That charge was however withdrawn, and LCS was subsequently given a discharge not amounting to an acquittal. This point was one of the major contentions propounded by the appellants challenging the findings of the courts below on the point of predicate offence. They argued that the seized properties could not be said to have been connected with the offence of money laundering premised on the discharged offence of cheating under s 420 of the Penal Code. It was also argued that the courts below had applied the wrong standard of proof in relation to proving the said predicate offence.

[10] As regards the forfeiture application by the PP, two firms of solicitors responded to the third-party notice issued, and claimed as third parties for the legal fees rendered in representing the respondents in the forfeiture proceeding and in defending against their prosecutions for the related offence of cheating under s 420 of the Penal Code which later ended in the respondents being discharged. This third-party claim was heard by the High Court together with the forfeiture application, but was dismissed.

[11] On the PP's forfeiture application, the High Court was satisfied that the listed properties (except those seized from the 17th respondent) were the subject-matter or evidence relating to the commission of an offence of money laundering under sub-s 4(1)(a); and that there was no purchaser in good faith for valuable consideration in respect of those properties. As such, pursuant to s 56(2) of the AMLA 2001, and by virtue of s 58 of the same Act, the forfeited properties were ordered to be vested in the Federal Government. This judgment of the High Court can be found in *Public Prosecutor v JJ Power Groups Enterprise & Ors* [2020] MLJU 375. That decision was thereafter affirmed and upheld unanimously by the Court of Appeal. The written judgment of the Court of Appeal was unfortunately neither reported nor unreported.

THE STANDARD OF PROVING PREDICATE OFFENCE — BEYOND REASONABLE DOUBT OR ON THE BALANCE OF PROBABILITIES?

[12] The High Court in this regard had ruled that 'In determining whether the seized property relates to the offences of money laundering or terrorism financing and of any question of fact in proceedings under the AMLATFPUAA, the same standard of proof applies, namely on the balance of

probabilities. This is provided for under ss 56(4) and 70 of the Act, respectively'. A

[13] That standard of proof was similarly applied in the High Court's assessment of the PP's evidence in respect of the existence of the predicate offence of cheating under s 420 of the Penal Code, which was viewed as a constituent element of money laundering in this case. The evidence examined includes the affidavits and the accompanying exhibits in the form of various police reports, recorded statements under s 32 of the AMLA 2001, statements of bank accounts, and all other documents relating to the landed property in Perak and the two vehicles. In the words of the High Court, it says: B C

> [40] In deciding whether or not the applicant succeeded in proving its case on the balance of probabilities, this court will consider, based on the affidavit evidence, how likely are certain facts which form the basis for the applicant's application. If after weighing the evidence the court believes that such facts point to probabilities which by reasonable conclusion supports the applicant's contention and are probable in light of the circumstances of the case in its entirety, the applicant is said to have succeeded in establishing its case on the balance of probabilities. On the other hand, if the facts as proved by the evidence led by the applicant give rise to a set of inferences from which the degree of probabilities in favour of the application and the respondent's case are equal, the applicant, who bears the burden to prove its case on the balance of probabilities, must fail. D E

[14] The application of this standard of proof on the balance of probabilities was affirmed and upheld by the Court of Appeal. In its judgment, the Court of Appeal agreed further with the view taken by the High Court that there was never any statement to the standard of proving predicate offence beyond reasonable doubt by the Court of Appeal in *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763 ('Billion Nova'). F G

[15] Before us, the appellants persistently argued that the correct standard of proof to be applied in proving predicate offence is beyond reasonable doubt and not on the balance of probabilities. Reference was made primarily to the decision of the Court of Appeal in *Simplex Sdn Bhd & Ors v Public Prosecutor* [2021] MLJU 32; [2021] 4 CLJ 595 ('Simplex'), in particular paras [20] to [27] of that case. H

[16] Essentially, the appellants argued that based on *Simplex,* it is incumbent on the PP to establish, in any application for forfeiture of property, the existence of an exact predicate offence, and that, by virtue of s 70(2) of the AMLA 2001, that predicate offence must be proved beyond reasonable doubt. I

[17] Based on *Simplex,* it was contended that when the said predicate offence has been proved beyond reasonable doubt, only then the specific proceeds

derived from that predicate offence which were used in the commission of an offence of money laundering, be proved on the balance of probabilities. The link between the proved predicate offence and the commission of money laundering was viewed to be crucial and a prerequisite to forfeiture under s 56 of the AMLA 2001.

[18] Importantly, the Court of Appeal in this appeal was argued to have fallen into error when it failed to consider *Simplex,* despite that case, having been argued in great detail. And that failure, according to the appellants, was fatal based on the principle of stare decisis, or judicial precedent as was enshrined in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 ('Dalip Bhagwan Singh').

[19] In contrast to the appellants' position, the PP cited two cases decided by the Court of Appeal. They are *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2019] 2 MLJ 536 ('Ismahanum') and *Mohd Ismail bin Syed Merah v Public Prosecutor and other appeals* [2022] 3 MLJ 786 ('Syed Merah'). According to the PP, these two cases have clearly shown that the standard of proof required to prove the element of 'proceeds of unlawful activity' is 'on the balance of probabilities' as stipulated by ss 56(4) and 70(1) of the AMLA 2001. The 'unlawful activity' in the present appeal was the offence of cheating under s 420 of the Penal Code, a listed offence in the Second Schedule of the AMLA 2001 which is defined as a 'serious offence'.

OUR VIEW

[20] Before we proceed to state our view on the four cases cited by the parties, we find it appropriate to comment on the principle of stare decisis, which, according to the appellants had not been observed by the Court of Appeal, and thus, it erred when it failed to follow the ruling made by *Simplex* on the point of proving predicate offence beyond reasonable doubt.

[21] Having perused the judgment of the Court of Appeal, we find no reference that was made to *Simplex.* However, it does refer to *Billion Nova,* an earlier decision of the Court of Appeal, which was cited and referred to by the appellants in the Court of Appeal. *Billion Nova* was, in the opinion of the Court of Appeal, an authority to show that the burden on the PP is to prove on the balance of probabilities, and not beyond reasonable doubt because the focus of the court in a forfeiture proceeding is on the legal status of the seized properties.

[22] When this court in *Dalip Bhagwan Singh* stated that 'The doctrine of stare decisis or the rule of judicial precedent dictates that a court other than the highest court is obliged generally to follow the decisions of the courts at a

higher or the same level in the court structure …', that duty is subject to certain exceptions, particularly, the Court of Appeal. The court then referred to *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 and stated about the three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of coordinate jurisdiction. Firstly, a decision of Court of Appeal given per incuriam need not be followed. Secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one. Thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the apex court, ie, the Federal Court. The court further stated that 'There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane*'.

[23] In the present appeal, although the Court of Appeal does not mention *Simplex,* it however referred to *Billion Nova* and ss 56(4) and 70(1) of the AMLA 2001. It then expressed its view that based on *Billion Nova,* the standard of proof as applied by the High Court on the balance of probabilities, was the correct approach. We perceived that the Court of Appeal made that election based on its understanding of *Billion Nova* and both statutory provisions. In our considered view, the Court of Appeal cannot be said to be wrong simply because it decided to follow one decision over the other, provided a reasonable and justifiable explanation is given.

SIMPLEX VERSUS OTHER COURT OF APPEAL CASES

[24] We have analysed *Billion Nova* [2016], *Ismahanum* [2019], *Simplex* [2021], and *Syed Merah* [2022], and found that except *Syed Merah,* all the other three cases dealt with the forfeiture of property under s 56 of the AMLA 2001.

[25] *Syed Merah* is an appeal against the conviction and sentence for eight offences of money laundering under s 4(1)(a) of the AMLA 2001. This case was relied on by the PP as an authority, alongside *Ismahanum,* that the element of unlawful activity is to be proved on the balance of probabilities in accordance with the provisions of ss 56(4) and 70(1) of the AMLA 2001.

[26] In *Syed Merah,* the High Court applied the standard of 'beyond reasonable doubt' to prove the offence of money laundering. However, in respect of proof of the element of 'unlawful activity', it applied the standard of 'on the balance of probabilities'. This approach was affirmed on appeal as the Court of Appeal viewed it to be in accordance with the above provisions. Further the Court of Appeal was of the considered view that proof of unlawful

activity per se does not prove the offence of money laundering under s 4(1) of the AMLA 2001.

[27] However, having perused and analysed *Syed Merah,* we do not think that the case is of significant relevance to be considered by us on determining the correct and applicable standard to prove predicate offence. Firstly because the nature of that case is not a forfeiture of property proceeding. It is an appeal against the conviction and sentence. On this point alone, the question of the applicable standard of proof differs.

[28] Secondly, and most importantly, *Syed Merah* was subsequently reviewed by a different panel of the Court of Appeal. The review panel disagreed with the finding of the earlier panel on the question of proving the element of 'unlawful activity' on the balance of probability based on ss 56(4) and 70(1) as that case is not a forfeiture proceeding but rather a prosecution of an offence, and therefore, by virtue of s 70(2) of the AMLA 2001 the applicable standard to prove every constituent element of the offence including the element of 'unlawful activity' must be beyond reasonable doubt. Hence, the application of ss 56(4) and 70(1) by the earlier panel to prove the element of 'unlawful activity' on the balance of probabilities in a prosecution of an offence under the AMLA 2001 was viewed to be inappropriate.

[29] As regards the other three cases, namely *Billion Nova, Ismahanum* and *Simplex,* they were concerned with two common points of legal interest. Firstly, that they deal with the forfeiture of property under s 56 of the AMLA 2001; and secondly, that the element of 'proceeds of unlawful activity' is to be proven on the balance of probabilities.

[30] In fact, this court had, in *Public Prosecutor v Awalluddin bin Sham Bokhari* [2018] 2 MLJ 401 ('Awalluddin'); and *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2021] 2 MLJ 469 ('Kuala Dimensi') affirmatively ruled that the standard of proof to determine whether the property has been obtained as a result of or in connection with an offence of money laundering under s 4(1) is the standard of proof required in civil proceedings, ie, on the balance of probabilities. In *Kuala Dimensi,* this court had specifically stated that:

> [39] The provision of s 56 of the AMLATFA does not absolve the prosecution from proving on a balance of probabilities that the properties seized under the purview of the Act were procured as a result of or in connection with an illegal activity or transaction. The PP must be able to prove that the properties seized were procured in connection with the commission of the predicate offence.

[31] However, *Simplex* went on further to single out that predicate offence must first be proved beyond reasonable doubt. It ruled that it is only upon

successful proof of that element that the 'proceeds of an unlawful activity' be proved on the balance of probabilities. In other words, according to *Simplex,* there are two tiers of proof and two different standards of proof to be applied depending on what needs to be proven in a forfeiture of property under s 56 of the AMLA 2001. We shall, for clarity reproduce the relevant part of the judgment in *Simplex* in this respect. It held that:

> [20] Having established the essence of money laundering, we pause to observe that s 56 when read together with s 4 of the Act establishes the necessity for the existence of a predicate offence. The predicate offence here is the offence under s 135(1)(g) of the Customs Act 1967.
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> ...
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> [22] Section 70(2) recognises that when it comes to proving the predicate offence, the burden on the prosecution must be beyond a reasonable doubt.
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> [23] Once the predicate offence is proved beyond a reasonable doubt, it must then be proved, on a balance of probabilities, that the specific proceeds derived from the predicate offence, was used in the commission of an offence of money laundering ...
>
> [24] This link between the predicate offence and the commission of money laundering is a pre-requisite to forfeiture as provided under s 56 of the Act 613.
>
> [25] The court in determining whether the proceeds are from an unlawful activity under s 4 shall apply the standard of proof required in civil proceedings or as we know it, on a balance of probabilities.
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> [26] It is therefore trite that the simple existence of an alleged, and as yet unproven, predicate offence is insufficient. The specific proceeds from the said predicate offence must be linked to the offence of money laundering which is crucial to establish the commission of an offence under s 4(1)(a) and this is a prerequisite to s 56(1) of the Act.
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> [27] Following from the above, it is incumbent for the respondent to make clear to this court and the appellants, in any application for forfeiture, the following elements:
>
> (a) the exact predicate offence, the evidence and basis upon which the commission of the offence has been established beyond reasonable doubt; ...

[32] Based on the above ruling, the Court of Appeal was clearly basing its application of the standard of beyond reasonable doubt on s 70(2) of the AMLA 2001. Going by the reasoning in *Simplex,* it would mean that the PP must first prove this predicate offence of s 420 of the Penal Code beyond reasonable doubt, before proceeding on proving, on the balance of probabilities, the proceeds derived therefrom.

[33] We must state that in comparison to *Simplex,* the Court of Appeal in *Billion Nova* while stating the importance of proving the element of 'unlawful

activity' as a pre-requisite in a forfeiture of property under s 56 of the AMLA 2001, however, did not specifically state the standard of beyond reasonable doubt as the required standard of proof. In its judgment, 'on the balance of probabilities' had been the applicable standard of proof in evaluating the evidence presented in a forfeiture of property under s 56 of the AMLA 2001.

PREDICATE OFFENCE IS NOT 'AN OFFENCE UNDER THE ACT OR ANY SUBSIDIARY LEGISLATION UNDER IT'

[34] We shall reproduce s 70 in its entirety as *Simplex* had grounded its ruling on proof of predicate offence beyond reasonable doubt based on s 70(2). Section 70 reads:

> Section 70 Standard of proof.
>
> (1) Any question of fact to be decided by a court in proceedings under this Act shall be decided on the balance of probabilities.
>
> (2) Subsection (1) shall not apply in relation to any question of fact that is for the prosecution to prove in any proceedings *for an offence under this Act or any subsidiary legislation under it*.

[35] First and foremost, we must emphasise that nowhere in any of the provisions in the AMLA 2001 that the word 'predicate offence' is used. Instead, it employs the word 'unlawful activity' as a determining criterion of the legality or otherwise of the proceeds derived therefrom. 'Unlawful activity', and not predicate offence, is defined in a wider sense to mean 'any activity which constitutes any serious offence or any foreign serious offence; or any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence, regardless whether such activity, wholly or partly, takes place within or outside Malaysia (s 3(1) of the AMLA 2001). This means, 'serious offence' is an element in the definition of 'unlawful activity'. Therefore, 'unlawful activity' and 'serious offence' are not equal or the same.

[36] And 'serious offence' is further defined to mean 'any of the offences specified in the Second Schedule; an attempt to commit any of those offences; or the abetment of any of those offences' (s 3(1) of the AMLA 2001). In the present forfeiture application, the 'serious offence' involved was that of cheating under s 420 of the Penal Code. This offence is what is referred to in this present appeal as a predicate offence. In fact, the 'serious offence' is what is commonly referred to as predicate offence. The question is, is 'serious offence' or the predicate offence is what is meant by the phrase 'an offence under this Act or any subsidiary legislation under it' in s 70(2) of the AMLA 2001 where the standard of beyond reasonable doubt is applied?

[37] We hold that it is not. And this is where *Simplex* had gone into error in its interpretation of s 70(2). We are of the considered view that the offence of cheating under s 420 of the Penal Code which is a 'serious offence' and which is referred to as the 'predicate offence' is not an offence contemplated within the meaning of 'an offence under this Act or any subsidiary legislation under it' in s 70(2) of the AMLA 2001, which provision that was used by *Simplex* as an authority to support its view that the standard of proof is beyond reasonable doubt.

[38] The reason is this. Section 70 is a provision governing the standard of proof to be applied in proving any question of fact in proceedings under the AMLA 2001. Generally, 'Any question of fact to be decided by a court in proceedings under this Act shall be decided on the balance of probabilities' (s 70(1)). However, this standard of proof is not applicable in relation to 'any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act or any subsidiary legislation under it'. The phrase 'an offence under this Act or any subsidiary legislation under it' refers to an offence under the AMLA 2001 or under any of its subsidiary legislation. This means that in any prosecution of any offence under the AMLA, such as money laundering or terrorism financing, the standard of proof shall be beyond reasonable doubt.

[39] The offence of cheating under s 420 of the Penal Code or any of the listed serious offences in the Second Schedule is/are not an offence/offences that is meant by 'an offence under this Act or any subsidiary legislation under it'. Because those serious offences which are also predicate offences are offences under the respective relevant statutes, and not under AMLA. The predicate offence is not 'an offence under this Act' within the meaning of s 70(2) of the AMLA 2001.

[40] Secondly, s 56(4) of the AMLA 2001 had specifically stated that the court shall apply the standard of proof required in civil proceedings, ie, on the balance of probabilities, in its determination, on the facts of this appeal, of whether the property is the subject-matter or evidence relating to the commission of money laundering. The clear and express statement of the required standard of proof requires no further interpretation, as was done by *Simplex*.

[41] Furthermore, the application for forfeiture of proceeding under s 56 of the AMLA 2001 is specifically for a situation where there is no prosecution or conviction for an offence of money laundering or a terrorism financing offence. It is a forfeiture proceeding separate from any requirement for proof of a predicate offence beyond reasonable doubt. It is a special regime provided for

under the AMLA 2001 that has not nexus with having to prove the predicate offence beyond reasonable doubt.

[42] As such, when the Court of Appeal in *Simplex* ruled that the predicate offence must be proved beyond reasonable doubt in a forfeiture proceeding on the ground of s 70(2) of the AMLA 2001, we find that it has misread that provision for the reasons stated above. With due respect, it has fallen into legal error.

[43] Just to be clear on this, the net effect of s 70(2) of the AMLA 2001, read in the totality of the legislative scheme, upon which it is premised, is this: that in a criminal proceeding undertaken by the prosecution, for an offence under the AMLA 2001 and its subsidiary legislation, the provisions stipulated under s 70(1) do not apply to the prosecution. The usual standard of proof applicable on the prosecution in a criminal proceeding is applicable. Thus, if one is prosecuted for an offence of money laundering under s 4(1) of the AMLA 2001 for instance, each and every element of that offence, including the element of 'proceeds of an unlawful activity' must be proved beyond reasonable doubt.

[44] To our mind, s 70(2) is there to reiterate the trite general principle of criminal jurisprudence pertaining to the standard of proof to be applicable. It may appear obvious to many but nonetheless, it may not. In that regard, s 70(2) has a purpose to be achieved and as is usual, Parliament does not act in vain. In our considered view therefore, s 70(2) is not intended to apply in the context of proving predicate offence in a forfeiture proceeding or to impose such burden and standard on the PP in this matter.

[45] Another inevitable consequence of s 70(1) and 70(2) of the AMLA 2001 read together on the applicable standard of proof to proceedings under s 56 of the AMLA 2001 must be that the standard of proof required to be discharged in establishing the incumbent essential ingredients under s 56 is one on the balance of probabilities. Section 56(1) is couched upon there being no prosecution or conviction under s 4(1) or for a terrorism financing offence.

[46] As such, we found, with respect, that the Court of Appeal in *Simplex* has misinterpreted s 70(2) of the AMLA 2001 by imposing a standard of beyond reasonable doubt on proving predicate offence in a forfeiture proceeding — which is not a criminal prosecution type of action — a requirement which is not explicitly stated within the statutory language nor implied by its underlying purpose. We find that it has read into that provision, in the way it interpreted it, a requirement or condition, be it express or by necessary implication, which was not intended by Parliament.

[47] As such, for the purpose of an application to forfeit any property where

there is no prosecution or conviction under s 56 of the AMLA 2001, we hold that any question of fact, and every element to be proved shall be assessed and proved on the balance of probabilities (ss 56(4) and 70(1)). There is no such thing, as *Simplex* suggested, a requirement of the two-tier level of proof and two different standards of proof in a forfeiture proceeding under s 56 of the AMLA 2001.

JJPTR INVESTMENT SCHEME AND ILLEGAL DEPOSIT TAKING — AN ELEMENT OF CHEATING?

[48] The essence of the appellants' remaining four petitions deals with the findings of fact made by the courts below on the proved offence of cheating under s 420 of the Penal Code.

[49] In this regard, the High Court found that the prosecution had proved, on the balance of probabilities, the offence of cheating under s 420 of the Penal Code where the seized properties were derived from. The exception was only in respect of the 17th respondent, where the seized monies were not proven to be 'proceeds of an unlawful activity' as they were monies from customers in the gambling excursions at the casino in Genting Highlands.

[50] The evidence that was considered include 19 police reports, the statements recorded under s 32 of the AMLA 2001 (reference was made to *Awalluddin* on the admissibility of the said recorded statements), various bank accounts, documents relating to the two vehicles and the landed property, verification from the Central Bank of Malaysia and the Securities Commission Malaysia, to name a few — which are all in the exhibits attached to the relevant affidavits. And the conclusion made in this respect was this:

> [52] After examining the material facts together with the documents provided by the applicant, I find that on the balance of probabilities, the applicant has succeeded in establishing the existence of the predicate offence of cheating under s 420 of the Penal Code. The ingredient of deceit which is central to the offence of cheating is obviously present. Wrongful losses were occasioned to the investors and the 23rd respondents and the related companies fronting the JJPTR scheme had made wrongful gains. The police reports lodged by the individual investors coupled with the statements recorded under s 32 of the Act are the basis and sufficient for this court to conclude that the applicant has succeeded in showing the commission of the predicate offence of cheating under s 420 of the Penal Code on the balance of probabilities.

[51] The above findings were affirmed by the Court of Appeal. It held that the evidence clearly showed that there was the element of deception in the JJPTR investment scheme, and which was also unlicensed, hence, an illegal deposit taking.

[52] The appellants in this respect questioned the courts' finding of unlicensed, thus illegal deposit taking as an element of cheating. The nature of JJPTR investment was, according to the appellants did not require any license and the payment made was not 'deposit' within the meaning of s 136 of the FSA 2013. Hence, unlicensed deposit taking was not, according to the appellants, an element of cheating. In any event, according to the appellants, the offence of cheating under s 420 of the Penal Code and unlicensed/illegal deposit taking under s 137 of the FSA 2013 are two different and separate offences. The evidence was argued to be lacking, especially when there was no forensic accounting conducted to show the money trail of the seized properties.

[53] The PP on the other hand argued that the evidence with the documents presented were voluminous to show the deceit that took place in the JJPTR scheme. The recorded statements were not only taken from all the respondents but also from many other individuals including the officers and workers of the appellants, their acquaintances, investors, and agents to the scheme. LCS, being the founder of JJPTR and the mastermind of the fronting companies had been inconsistent in his statements in the affidavits and the recorded statements given to the police. The appellants had failed, according to the PP to show any documents or proof showing their source of income and finance to own the seized properties.

TESTING THE FACT-FINDING — THE 'PLAINLY WRONG' TEST

[54] It is a well-established principle of law that in matters relating to the findings of fact based on the assessment and examination of the evidence, the Appellate Court will not disturb what the trial judge had so found unless such finding was 'plainly wrong'.

[55] This principle has been recently dealt with by this court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, where this court, in reaffirming the application of the plainly wrong test has held, that in dealing with issues relating to the findings of fact based on evidence, '... The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts'.

[56] In assessing the evidence, the court must be satisfied that all the ingredients or the elements to be proved, are proved on the required standard. This court had, in *Kuala Dimensi*, indicated what and how the evidence in the forfeiture proceedings is measured. It says that:

> [49] When applying the civil standard of proof on a balance of probabilities merely stating facts with scanty documentary evidence is insufficient. There must be more cogent documentary evidence to support the averments made and that all facts

necessary to prove their case must be presented and are probably true. A

[57] In so far as the authorities that were referred to us, *Billion Nova* and *Kuala Dimensi* provided clear examples of when and how the PP had failed in its application for forfeiture of properties under s 56 of the AMLA 2001, which was primarily due to the insufficient evidence to prove that the seized properties were proceeds of an unlawful activity. B

[58] In this regard, we have perused all the affidavit evidence and the accompanying exhibits and documents, and having considered the judgments of the courts below, the petitions and both parties submissions, we are not persuaded to agree with the appellants' contention that the High Court had been plainly wrong in his assessment of all the evidence presented before him on the balance of probabilities. Every finding he had made was sufficiently supported and reasonably justified by the evidence adduced before him. We do not find any cogent reason why we should, or how we could depart from his findings. C D

CONCLUSION

E

[59] We always remind ourselves, lest we forget, that the fundamental principle of statutory interpretation tells us that where the language of a statutory provision is clear and unambiguous, the courts, we included, must apply its plain and ordinary meaning. In such instances, the court's primary duty is to give effect to the expressed intention of Parliament (*Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721). F

[60] The forfeiture of property proceedings as envisaged under s 56 of the AMLA 2001 is a special regime specifically provided for under the AMLA 2001 where there is no prosecution or conviction for an offence of money laundering or a terrorism financing offence. In proving each and every element in that proceeding, ss 56(4) and 70 of the AMLA 2001 impose no other standard, but a standard on the balance of probabilities. Having so ruled, and after a careful examination of the evidence, and the proper standard of proof to the facts of this appeal, we are not inclined to depart from the concurrent findings of fact made by the judges in the courts below. G H

[61] In the upshot, we do not find any merits in this appeal, and we hereby affirm the decision of the Court of Appeal which affirmed the findings and decision of the High Court that the evidence had established, on the balance of probabilities that the seized properties were the subject matter or evidence relating to the commission of money laundering and were the proceeds of an I

unlawful activity. As such, this appeal by the four appellants is dismissed.

Appeals dismissed; and decisions of the courts below affirmed.

Reported by Ashok Kumar